

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10019 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
2. To be referred to the Reporter or not? : YES
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO
1 & 2 - Yes, 3 to 5 - No

VISHNUPRASAD C. DARJI

Versus

REGISTRAR

Appearance:

MR PV HATHI for Petitioners
MR SN SHELAT, ADDL. ADV. GENERAL for Respondent No. 1
MR PK JANI for Respondent No. 2
MR DC DAVE for Respondent No. 4
Ms MANISHA LAVKUMAR, AGP for Respondent No. 7

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 20/08/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, two Private Secretaries (English Stenographer Grade-I) Class II on the establishment of this Court have challenged the communication dated 6.9.1993 (Annexure "F" colly.) from the Deputy Registrar, on behalf of the High Court of Gujarat to the petitioners

rejecting their application for grant of higher grade scale. The communication states that the Deputy Registrar was directed to state that the petitioners cannot be granted higher grade scale with effect from 1.8.1993 as it is not admissible under the Rules and hence the petitioners' applications were not entertained.

2. Petitioner No. 1 was appointed as a Section Writer in the Small Causes Court and worked as such between 1.8.1978 and 17.1.1980. Thereafter, he came to be appointed as Stenographer Grade III with effect from 18.1.1980 in the District Court, Baroda where he worked as such till 31.5.1980. Petitioner No. 1 was thereafter appointed as Stenographer Grade II with effect from 1.6.1980 in the same Court and continued to work on the said post till 31.7.1984. By order dated 17.7.1984, petitioner No. 1 came to be appointed as Personal Assistant (Stenographer Grade I) in the pay scale of Rs.650-1040 (revised Rs.2000-3500) in the City Civil Court at Ahmedabad. Thereafter by order dated 16.8.1990 petitioner No. 1 was appointed as Private Secretary (English Stenographer Grade I) on the establishment of this Court in the pay scale of Rs.2000-3500 where his pay was protected. Since 1.9.1990 petitioner is working on the aforesaid post.

3. Similarly, petitioner No. 2 was appointed as Stenographer Grade II in May, 1978 in the Small Causes Court, Ahmedabad and with effect from 1.8.1984 he was appointed as Personal Assistant (English Stenographer Grade I) in the pay scale of Rs.650-1040 (revised Rs.2000-3500) in the City Civil Court at Ahmedabad. Thereafter by order dated 16.8.1990, petitioner No. 2 came to be appointed as Private Secretary (English Stenographer Grade I) Class II on the establishment of this Court in the pay scale of Rs.2000-3500.

4. Both the petitioners submitted a representation dated 3.7.1993 requesting the Registrar of this Court to grant the petitioners the benefit of the nine year rule as prescribed by the Government Resolution dated 5.7.1991 with effect from 1.8.1993. The said representation came to be turned down by the communications dated 6.9.1993(Annexure "F"colly.). It is the decision communicated through the aforesaid letters which is under challenge in this petition.

5. At the hearing of the petition, Mr PV Hathi, learned counsel for the petitioners has made the following submissions :-

(i) As per the Government Resolution dated 5.7.1991 (Annexure "G"), the first higher grade scale is to be granted on completion of 9 years of service in the relevant scale if the employee has not received more than two promotions earlier. That condition is satisfied in case of each of the petitioners. As per the clarification given by the said Resolution, for the purpose of computation of 9 years in the relevant scale all service that counts for increments in that scale shall be taken into account. The pay of each petitioner was protected by counting the service rendered by him as a Stenographer Grade I in the City Civil Court. Hence, all the conditions prescribed by the Government Resolution dated 5.7.1991 having been satisfied, the impugned decision dated 6.9.1993 was contrary to law and is required to be set aside. If the High Court on the administrative side had correctly taken the decision at the relevant time, the petitioners would have been given the benefit of 9 year rule as per the said Government Resolution.

(ii) It is submitted that the petitioners are not claiming their seniority in the cadre of Private Secretaries (English Stenographer Grade I) on the establishment of this Court on the basis of any services rendered prior to the date of joining the establishment of this Court and that they are expressly conceding that position, but at the same time the time bound promotion as provided in the Government Resolution dated 5.7.1991 cannot be linked with seniority. Reliance is placed on the decision of the Apex Court in AIR 1999 SC 598.

6. On the other hand, Mr SN Shelat, learned Additional Advocate General for respondent No.1-Registrar of this Court, Ms Manisha Lavkumar, learned AGP for respondent No.7-State of Gujarat and Mr PK Jani with Mr Unwala and Mr DC Dave for the private contesting respondents have opposed this petition and have made the following submissions :-

(i) The petitioners were direct recruits in the cadre of Private Secretaries (English Stenographer Grade I) on the established of this Court. Hence, they can never claim the benefit of their services rendered as Stenographers in other Courts for any purpose except for the purposes

for which their earlier services could be taken into account i.e. for the limited purpose of pay fixation, leave and pension. Their prior services could not be taken into account for the purpose of seniority or for the purpose of granting higher grade scale.

(ii) Government Resolution dated 5.7.1991 has been substituted by the Government Resolution dated 16.8.1994 which expressly provides that services which cannot be taken into account for fixing seniority cannot be taken into account for the purpose of granting higher grade scale.

(iii) Even prior to 16.8.1994 the Government had issued a clarificatory circular dated 11.10.1991 (Page. 31) wherein the Government had clarified that even if the pay scale is the same, but there is a change of cadre, the services rendered in the previous cadre cannot be taken into account for the purpose of granting the higher grade scale.

(iv) The petitioners having joined in the cadre of Private Secretaries on the establishment of this Court as direct recruits, the services rendered by them in the cadre of Private Secretaries (English Stenographer Grade I) in the City Civil Court cannot be taken into account. Reliance is also placed on the decision of the Supreme Court in the case of C.G. Govindan vs. State of Gujarat, (1999) 1 GLR 512 for contending that two cadres are separate.

7. In rejoinder, Mr Hathi submitted that if the petitioners' applications were correctly decided, the petitioners would have got the benefit of the pay scale in 1993 with effect from 1991 and that, therefore, subsequent Government Resolution dated 16.8.1994 cannot take away the rights which had vested in the petitioners prior to the coming into force of the new Resolution.

Mr Hathi has further made submissions on the issue about the mode of recruitment and the same is dealt with hereinafter.

PRELIMINARY SUBMISSION

8. Before dealing with the contentions raised on behalf of the petitioners, it is necessary to deal first with the preliminary submission made on behalf of the respondents that the petitioners are direct recruits in

the cadre of Private Secretaries (English Stenographer Grade-I) on the establishment of this Court and, therefore, they can never claim the benefit of their services rendered as Stenographers in other Courts. In this regard, averments made in para 5 of affidavit-in-reply filed on behalf of the Registrar of the High Court are that petitioner No. 1 was previously working as a Personal Assistant (Stenographer Grade-I) in City Civil Court in the pay scale of Rs.2000-3500 with effect from 1.8.1984 and that thereafter upon his applying for the post of Stenographer Grade-I, petitioner no.1 came to be selected and appointed on the establishment of this Court as Private Secretary (English Stenographer Grade-I) with effect from 1.9.1990 in the pay scale as applicable to the post held by him in the City Civil Court. Similar averments are made about petitioner no.2.

9 As against this stand, it is pointed out by Mr Hathi, learned counsel for the petitioners that the petitioners were not appointed pursuant to any public advertisement but English Stenographers Grade-I working on the establishments of courts subordinate to this Court and desirous of appointment to the post of Private Secretary (English Stenographer Grade-I), Class-II in the pay scale of Rs.2000-3500 on the establishment of this Court were invited to submit their applications in the prescribed proforma and as per the notice dated 13.2.1990 and that they were merely asked to show their willingness and to undergo the stenography test, but there was no interview.

10. Now, it is to be noted that visualising such a situation the Government itself has issued a Resolution dated 24.5.1993 that when a person is already in government service and thereafter he gets selected and appointed on any other post in government service and if there is no break in service, such employee's previous services are to be taken into account for the purpose of fixation of pay, grant of leave, and for computation of pension but not for seniority. Such an employee who applies through proper channel and gets selected for any other post in the service of the State Government is not required to submit any resignation but is just to be relieved for resuming duty on the second post for which he is selected. It is thus clear from the aforesaid Government Resolution dated 24.5.1993 that such an employee is not to be given any benefit which is likely to hurt any other existing employee in the new cadre but benefits which can be given to him without adversely affecting any existing employee in the cadre are to be

given to him and, therefore, taking into account the previous service for the purpose of fixation of pay, grant of leave and computation of pension is not going to adversely affect the existing employees but the grant of seniority is bound to adversely affect the existing employees and, therefore, previous service cannot be taken into account for the purpose of fixing seniority. Therefore, nothing turns on the question whether the petitioners should be considered to be direct recruits on the establishment of this Court or whether the petitioners' recruitment was something less than direct recruitment but more than a transfer. Different considerations would arise if such previous services were not to be taken into account even for the purpose of pay fixation, leave or pension but since that is not the case, the aforesaid preliminary submission cannot be accepted.

PRINCIPAL CONTROVERSY

11 Now coming to the question about the change of cadre, there is no doubt that the cadre of private secretaries on the establishment of this Court is separate from the cadre of Private Secretaries (English Stenographer Grade-I) in the City Civil Court at Ahmedabad from where the petitioners came. In fact, this issue is no longer res integra and both the Hon'ble Judges of the Division Bench of the Apex Court have held so in C.G. GOVINDAN V/S STATE OF GUJARAT 1999 (1) GLR 512. The question which arises for consideration of the Court, therefore, is whether mere change of cadre disentitles a government employee from relying on his previous services for the purposes of getting the benefit of 9 year rule. On this question also the Apex Court in the case of Dwijen Chandra Sankar, AIR 1999 SC 598 has held that when employees are transferred from one department to another, subject to the condition that their past service in the previous department would not count for seniority, they are entitled to have their services in the first department taken into account for getting the benefit of the 9 year rule which rule is framed to relieve the employees from stagnation. The underlying object of this rule is that that transfer of an employee should not disturb chances of promotion of those who are already working in the new (transferee) Department. The Apex Court has made the following pertinent observations:-

"However, the position in regard to time-bound

promotions is different. Where there are a large number of employees in any department and where the employees are not likely to get their promotion in the near future because of their comparatively low-position in the seniority list, Government has found it necessary that, in order to remove frustration the employees are to be given higher grade in terms of emoluments while retaining them in the same category. This is what is generally known as the time-bound promotion. Such a time-bound promotion does not affect the normal seniority of those higher up."

(emphasis supplied)

In the aforesaid decision, the Apex Court also referred to previous decisions given in RENU MALIK V. UNION OF INDIA, (1985) 3 SCC 305 & in A.P. STATE ELECTRICITY BOARD V. R. PARTHASARATHI (1998) 9 SCC 425 wherein it is held that even when the employees are transferred from one department to any other department on their own request and even when there is an undertaking that the services in the previous department shall not count for the purpose of seniority in the new department if the rules require minimum length of service for being eligible to the promotion to the higher post, services rendered in the previous department have to be considered for the purpose of eligibility criterion. The Apex Court in all the decisions has held that the seniority and eligibility are different concepts. The Court in terms held services rendered in another department determined the eligibility though it may not mention for seniority and this principle was applicable even when the transfer was at the employee's own request. In case of A.P. State Electricity Board (supra) the concerned employee was a government servant who was absorbed in the Electricity Board and the above principle was applied. In the instant case the petitioners were stenographers on the establishment of the City Civil Court at Ahmedabad. In the facts of the present case the above principle would apply and, therefore, petitioners are entitled to rely on their previous service rendered as English Stenographers on the establishment of City Civil Court for the purpose of getting time bound higher pay scales.

12. Moreover, the Government Resolution dated 5.7.19991 specifically provided in clause (ii) as under:-

"(ii) The first higher grade scale shall be granted on completion of 9 years of service in

the relevant scale provided that the employee has not received more than two promotions earlier. For the purpose of computation of 9 years service in the relevant scale, all service that counts for increment in that scale shall be taken into account."

The aforesaid words leave no room for doubt that all service that counted for increment in the scale of Rs.2000-3500 was required to be taken into account for the purpose of computation of 9 years of service. Admittedly, the petitioners' services in the posts of English Stenographer on the establishment of the City Civil Court were taken into account for the purpose of increments i.e. for the purpose of their pay fixation and therefore, the petitioners are entitled to get their service as Stenographers in the City Civil Court counted for the purpose of getting the benefit of 9 year rule. It was subsequently on 11.10.1991 that the Government issued clarification that if there is a change of cadre of service, service in the previous cadre cannot be taken into account for the purpose of fixing the seniority. This so called clarification must be held to be arbitrary and violative of petitioners' right under Article 14 of the Constitution in view of the aforesaid principle laid down by the Apex Court in the case of DWIJENCHANDRA SARKAR AIR 1999 SC 598. A similar provision in the Government Resolution dated 16.8.1994 must also be held to be arbitrary for the same reason.

13. The learned counsel for the respondents have however expressed an apprehension that the petitioners and another Private Secretary (English Stenographer Grade-I) Class-II on the establishment of this Court have filed Special Civil Application claiming seniority in the cadre of Private Secretaries (English Stenographer Grade I) on the establishment of this Court on the basis of the services rendered by them as English Stenographers in the City Civil Court, Ahmedabad, and, therefore, the petitioners cannot be given any benefit of the higher pay scale by virtue of 9 year rule and also claim the benefit of seniority in the aforesaid petition.

The apprehension is quite justified and the petitioners must, therefore, be put to terms before the benefit of 9 year rule can be given to them. It is, therefore, made clear that before the petitioners are given the benefit of the aforesaid 9 year rule, each of them must give a separate undertaking that the petitioner does not and shall not claim any seniority in the cadre of Private Secretaries on the establishment of this Court

on the basis of any services rendered prior to his joining to the establishment of this Court and the petitioner does not and shall not claim any benefit other than by way of pay fixation, leave, pension and the benefits of 9 year rule on the basis of the services rendered prior to the date of joining the establishment of this Court.

14. Having heard the learned counsel for the parties, for the reasons aforesaid this Court directs that subject to the condition precedent that each petitioner files a separate undertaking before the Registrar of this Court undertaking that -

(i) the petitioner does not and shall not claim any seniority in the cadre of Private Secretaries (English Stenographer Grade I) Class II on the establishment of this Court on the basis of any services rendered prior to his joining the establishment of this Court; and

(ii) the petitioner does not and shall not claim any benefit, other than pay fixation, leave, pension and the benefit being granted by this judgment, on the basis of the services rendered prior to the date of joining the establishment of this Court

the respondents shall give the petitioners the benefit of the nine year Rule i.e. the higher grade scale with effect from which the concerned petitioner was entitled to get the higher grade scale under the Government Resolution dated 5.7.1991 on the basis that the services rendered by the petitioners in the cadre of Private Secretaries (English Stenographer Grade I) in the City Civil Court in the pay scale of Rs.2000-3500 shall be counted for this purpose, though such services shall not be counted for the purpose of seniority, or for any purpose other than pay fixation, leave, pension and the benefit being granted by this judgment.

The aforesaid direction shall be complied with within three months from the date on which the concerned petitioner files such an undertaking before the Registrar of this Court.

15. Rule is made absolute to the aforesaid extent with no order as to costs.

Sd/-

August 20, 1999 (M.S. Shah, J.)

sundar/mohd